

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ASL SERVICES HOLDINGS, LLC)	FOIA Control No. 2012-158
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 2013**Released: January 18, 2013**

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny an application for review by ASL Services Holdings, LLC (ASL)¹ seeking review of a decision by the Consumer and Governmental Affairs Bureau (CGB) denying in part a Freedom of Information Act (FOIA) request by ASL.² We find that ASL has shown no error in CGB's decision to withhold some responsive records under FOIA Exemptions 4 and 5.

II. BACKGROUND

2. **Request.** ASL seeks records regarding the provision of Video Relay Services, Telephone Relay Services, and Internet Telephone Relay Services by companies called CSDVRS, LLC and ZVRS (collectively "CSDVRS"). The services in question are forms of Telecommunications Relay Services (TRS), which were established by the Americans With Disabilities Act of 1990 to enable individuals with hearing or speech disabilities to communicate by telephone or video.³ Providers of TRS, such as CSDVRS, receive compensation from the Interstate Telecommunications Relay Services Fund (TRS

¹ See Letter from Andrew M. Klein and Gregory Wallach to Austin Schlick, [former] General Counsel (Jun. 20, 2012) (AFR).

² See Letter from Kurt Schroeder, Acting Chief, Consumer Policy Division to Andrew M. Klein (May 22, 2012) (Decision).

³ See *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing And Speech Disabilities*, 27 FCC Rcd 7150 ¶ 1, n.1 (CGB 2012). Statutory authority for TRS is codified at 47 U.S.C. § 225.

Fund), which is administered by Rolka Loube Saltzer Associates, LLC (RLSA)⁴. A subsidiary of ASL provides Spanish and sign language interpreting services in connection with CSDVRS' TRS offerings.⁵

ASL submitted a FOIA request on January 20, 2012 requesting numerous documents concerning CSDVRS' TRS Fund compensation by RLSA, including compensation for services related to ASL's contractual relationship with CSDVRS, and records concerning CSDVRS' participation in a proceeding in which the Commission is considering modification of the rules regarding TRS (CG Docket No. 10-51).⁶ After consultation with CGB staff, ASL, on February 8, 2012, submitted an amended request that clarified and narrowed the scope of the documents sought.⁷ Among other documents, ASL sought: (1) CSDVRS filings, reports, and/or requests for [TRS Fund] compensation submitted to [RLSA] and (2) FCC and RLSA documents and information relating to payments to CSDVRS from the TRS Fund for services performed between June 1, 2011 and October 31, 2011.⁸ Because CGB had reason to believe that many of the responsive documents may have contained confidential commercial information, it notified CSDVRS of ASL's FOIA Request to give it the opportunity to object to disclosure.⁹ CSDVRS objected to the disclosure of records that it asserted contained confidential information.¹⁰

3. **Decision.** In its Decision, CGB withheld some documents containing company specific information regarding TRS payments, finding that they were confidential and subject to FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹¹ CGB further found that some other documents, consisting of discussions between RLSA and Commission staff regarding payments to CSDVRS, as opposed to communications to or from CSDVRS, were subject to the deliberative process privilege of FOIA Exemption 5. This provision applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."¹² CGB also found that it was unable

⁴ See 27 FCC Rcd at 7150 ¶ 1.

⁵ See *Petition for Temporary Waiver*, filed May 24, 2011 in CG Docket No. 10-51, by CSDVRS.

⁶ See Letter from Andrew M. Klein to Federal Communications Commission (Jan. 20, 2012) (Original Request).

⁷ See Letter from Andrew M. Klein to Michael Hennigan, Federal Communications Commission (Feb. 8, 2012) (Request).

⁸ See Request at 1-2. ASL also sought an e-mail from the FCC to CSDVRS and information concerning ex parte meetings related to CG Docket No. 10-51, established by *Structure and Practices of the Video Relay Service Program*, Notice of Inquiry, 25 FCC Rcd 8597 (2010). ASL's request for these records is not at issue in our consideration of ASL's AFR.

⁹ See 47 C.F.R. § 0.461(d)(3).

¹⁰ See Decision at 1-3. See also e-mail from Diane Mason to Sean Belanger and Jeff Rosen (Feb. 23, 2012) (notifying CSDVRS of ASL's FOIA Request); Letter from Jeff Rosen, General Counsel to Ms. Diane Mason, Attorney Advisor (Mar. 1, 2012) (objecting to disclosure).

¹¹ See Decision at 3; 5 U.S.C. § 552(b)(4).

¹² See Decision at 3; 5 U.S.C. § 552(b)(5). Exemption 5 encompasses the deliberative process privilege, which is intended to "prevent injury to the quality of agency decisions." See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

to segregate and release meaningful portions of these documents that were not exempt.¹³ In addition, CGB declined to make a discretionary release of the documents.¹⁴

4. **Application for Review.** ASL's application for review challenges CGB's decision to withhold responsive documents. ASL makes five arguments. First, ASL argues that the Decision arbitrarily narrows the scope of the documents requested relating to TRS Fund payments to CSDVRS.¹⁵ Second, ASL argues that it was improper for CGB to consider CSDVRS' objections to disclosure of company-specific information, since CGB did not copy ASL on its notification to CSDVRS regarding ASL's FOIA Request, and CSDVRS did not serve its objection on ASL.¹⁶ Third, ASL complains that CGB only released "non-substantive" documents and failed to release responsive "substantive" material that ASL claims is in the FCC's possession.¹⁷ Fourth, ASL argues that CGB unjustifiably failed to produce filings and reports to and from RLSA or RLSA documents and information relating to payments to CSDVRS from the TRS Fund.¹⁸ Fifth, ASL maintains that, even assuming that some material in the responsive documents is exempt, it is entitled to the documents with the exempt material redacted.¹⁹

III. DISCUSSION

5. We uphold the CGB's Decision. We find that none of the arguments that ASL makes in its AFR is persuasive.

6. First, we have consulted with CGB and determined that CGB searched for all documents described in the Request as: "FCC and RLSA documents and information relating to payments to CSDVRS from the TRS Fund for services performed between June 1, 2011 and October 31, 2011." Although the Decision described the documents as "RLSA payments to CSDVRS from the TRS Fund," the fact that the description in the Decision omitted the phrase "documents and information relating to" did not prejudice ASL, since CGB in fact conducted a search fully responsive to the Request and did not in any way "narrow" ASL's Request.

7. Second, we disagree with ASL's contention that CSDVRS did not effectively object to the disclosure of confidential material. Section 0.461(d)(3),²⁰ relied on by ASL, states:

¹³ See Decision at 4.

¹⁴ See *id.* In response to other aspects of the FOIA request not at issue here (*see supra* note 8), CGB released some documents and noted that others were publicly available.

¹⁵ See AFR at 2. Specifically, the Decision described these documents as "RLSA payments to CDVRS from the TRS Fund." See Decision at 1. By contrast, the Request described them as: "FCC and RLSA documents and information relating to payments to CSDVRS from the TRS Fund for services performed between June 1, 2011 and October 31, 2011." See Request at 1.

¹⁶ See AFR at 2-3.

¹⁷ See *id.* at 3-4.

¹⁸ See *id.* at 4.

¹⁹ See *id.* at 4-5.

²⁰ See 47 C.F.R. § 0.461(d)(3).

If a submitter has any objection to disclosure, he or she is required to submit a detailed written statement specifying all grounds for withholding any portion of the information (see §0.459). This response shall be served on the party seeking to inspect the records. . . . In the event that a submitter fails to respond within the time specified, the submitter will be considered to have no objection to disclosure of the information.

The plain language of the rule is that the submitter of confidential information will be considered to have no objection to disclosure if it “fails to respond” upon being notified of the FOIA request, not, as ASL would have it, if the submitter fails to serve its response on the requester.²¹ Further, while CSDVRS did not serve its objection on ASL, CGB did provide ASL with a copy of the objection to which ASL replied.²² In view of these circumstances, while we do not condone CSDVRS’ failure to comply with the service requirement in the rule, we find that ASL suffered no prejudice from CSDVRS’ non-service. Further, we note that contrary to ASL’s assertion,²³ CGB was not required by section 0.461(d)(3) or any other rule to copy ASL on the e-mail it sent to CSDVRS notifying it of ASL’s FOIA request. In any event, the fact that CGB did not copy ASL did not prejudice ASL, given that it had ample opportunity to dispute CSDVRS’ claim of confidentiality.

8. Third, we disagree with CGB’s argument that CGB “improperly limited the information produced to non-substantive documents.”²⁴ ASL asserts that it knows that nonexempt substantive material responsive to its FOIA Request exists, because CSDVRS previously provided ASL with “certain correspondence between CSDVRS and the FCC,” including “substantive information relating to meetings between CSDVRS and the FCC.”²⁵ ASL further asserts that the provision of such material constitutes a waiver of any right to object to disclosure.²⁶ We have, however, no information about what material ASL is referring to and have not discovered any nonexempt, responsive material in the Commission’s possession that has not been released. In this regard, we have ascertained that CGB contacted all personnel who would be expected to have access to responsive records and obtained all responsive records available to them. With respect to ASL’s waiver argument, any prior disclosure of material by CSDVRS to ASL would generally be irrelevant to whether such material should be disclosed in response to a FOIA request. Disclosure in response to a FOIA request is effectively disclosure to the public and not only disclosure to the requester.²⁷ ASL’s history of prior dealing with CSDVRS does not give ASL any

²¹ Thus, ASL’s reference to CSDVRS’ “failure to respond by service” (see AFR at 2) does not reflect the actual wording of the section, which provides that “the response shall be served.” This wording implies that making a response is distinct from serving it. CSDVRS thus “responded” for purposes of the section by submitting its response to CGB.

²² See Letter from Kurt Schroeder to Andrew M. Klein (Mar. 29, 2012) (transmitting CSDVRS’ objection); Letter from Andrew M. Klein to Kurt Schroeder, Acting Chief (Apr. 12, 2012) (acknowledging receipt of CSDVRS’ objection and disputing CSDVRS’ claims of confidentiality).

²³ See AFR at 3.

²⁴ See AFR at 3.

²⁵ See *id.*

²⁶ See *id.* at n.4. See also *id.* at 4.

²⁷ See *Skybridge Spectrum Foundation*, FCC 12-35 (Mar. 29, 2012) at ¶ 19, reported at 2012 WL 1095944, citing *Nat’l Archives and Records Admin v. Favish*, 541 U.S. 157, 174 (2003).

greater right to Commission records than any other member of the public.²⁸ The prior disclosure of confidential material by CSDVRS would be significant only under circumstances indicating that the material was made public as opposed to disclosed to a business partner.²⁹

9. ASL also suggests that it is entitled to any records referring to calls handled by ASL under its contract with CSDVRS.³⁰ We disagree. ASL gains no special entitlement to material submitted by a third party because the material refers to ASL's own activities. As noted above, ASL's rights as a FOIA requester are no different from those of any other member of the public.³¹

10. Fourth, we uphold CGB's Decision to withhold "information contained in filings and reports to and from RLSA, or RLSA documents and information relating to payments to CSDVRS from the TRS Fund."³² The records withheld under Exemption 4 consist of reports issued by RLSA calculating on a monthly basis the amount of support paid and withheld for VRS service provided by CSDVRS. The report summarizes the number of minutes for which compensation was paid with respect to each tier of service and contains a list describing calls for which compensation was withheld. We agree with CGB that information detailing the monthly revenue derived by CSDVRS from the TRS Fund as well as the incidence of calls for which compensation was withheld represents the type of competitively sensitive financial information that is protected from disclosure by Exemption 4.³³ We also agree with CGB that records consisting of correspondence between RLSA and the Commission that reflect their deliberations are exempt under the deliberative process privilege encompassed by Exemption 5.³⁴ As discussed above,

²⁸ See *Percy Squire*, 26 FCC Rcd 14930, 14933 ¶ 8 (2011) (in general, the identity of the requester and the purpose of the request are not taken into account in deciding whether to grant a FOIA request), and cases cited.

²⁹ See *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (publicly available information is not confidential).

³⁰ See AFR at 4-5.

³¹ See *supra* paragraph 8.

³² See AFR at 4.

³³ See *Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12729 ¶ 6 (2004) (affirming the withholding of all company-specific Universal Service Fund contribution information pursuant to Exemption 4, because disclosure would result in substantial competitive harm). See generally *Critical Mass Energy Project v. FCC*, 975 F.2d 871, 878-79 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) (discussing applicable factors in withholding material under Exemption 4). See also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (discussing applicable factors).

³⁴ Given the contractual relationship between the Commission and RLSA, as the TRS Fund administrator, we deem communications between the Commission and RLSA as intra-agency communications covered by Exemption 5. See *IBM Corp.*, 25 FCC Rcd 11085, 11089-90 ¶¶ 9-10 (2010) (treating communications between the Commission and USAC, the Universal Service Fund administrator, as intra-agency). See also *Electronic Privacy Information Center v. U.S. Dep't of Homeland Security*, Civil Action No. 11-945 (BJR) (D.D.C. Sept. 14, 2012), reported at 2012 WL 4044986 at *10-11 (communications between agency and contractor are intra-agency for purposes of FOIA Exemption 5). As the TRS Fund Administrator, RLSA is responsible to the Commission for: (1) implementing effective internal controls over TRS operations, (2) establishing procedures to verify payment claims, (3) reviewing the accuracy of TRS providers' submissions, (4) reporting TRS Fund program data to the Commission, and (5) notifying the Commission of potential noncompliance. See *Telecommunications Relay Service Fund Financial and Accounting Internal Controls*, DA 11-615 (OMD Apr. 5, 2011).

the fact that some of the records deal with ASL's services have no bearing on the analysis.³⁵ Fifth, we agree with CGB that it is not possible to redact exempt material from the responsive records and disclose meaningful information. We disagree with ASL's contention that it must be possible to do so.³⁶ We find that redacting the confidential details of CSDVRS' TRS Fund compensation from the reports would leave essentially no usable information. The information remaining would include CSDVRS' ProviderID (80015), the compensation rates for the different tiers, which is a matter of public record, and contact information for some CSDVRS employees, which we would withhold as privacy protected under FOIA Exemption 6.³⁷ Also remaining would be information not specific to CSDVRS, such as column headings, which we do not believe ASL is interested in. Finally, we have not been able to identify documents fitting ASL's description of nonexempt transmittal sheets or nonexempt signed verification pages.

IV. ORDERING CLAUSE

11. ACCORDINGLY, IT IS ORDERED, that the application for review by ASL Services Holdings, LLC IS DENIED. ASL may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).³⁸

12. The officials responsible for this action are the following: Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel, and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁵ See *supra* paragraph 9.

³⁶ See AFR at 4-5.

³⁷ See 5 U.S.C. § 552(b)(6), making exempt "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

³⁸ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect ASL's right to pursue litigation. ASL may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - Room 2510
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 877-684-6448.